BIDDLE v. HOOVEN.

In *Biddle* v. *Hooven*, 120 Pa. 221, it was decided that:

Section 7, Act of April 27, 1855, P. L. 369, providing: "That in all cases where no payment, claim or demand shall have been made on account of, or for any ground-rent, annuity or other charge upon real estate for twenty-one years, or no declaration or acknowledgment of the existence thereof shall have been made within that period by the owner of the premises, subject to such ground-rent, annuity or charge, a release or extinguishment thereof shall be presumed, and such ground rent, annuity or charge shall thereafter be irrecoverable," affecting the remedy merely, is not unconstitutional as impairing the obligation of a contact: *Korn* v. *Browne*, 64 Pa. 55, limited.

This case has never been satisfactory to the profession.

The defendant bought the ground at a sheriff's sale. Accepting a deed of sale reciting a contract for the payment of the rent, and binding himself by the covenants running with the land, he has taken upon himself to perform the contract, holding out to the world that he enjoys the land in consideration of payment to his landlord as expressed in *Ingersoll* v. *Sergeant*, 1 Wharton, 337. He binds himself not only to pay the rent at the times and in the manner in which it should become due, but with a further expressed covenant as to the method of extinguishment; the operation of this proviso is of the nature of a covenant to carry out a contract, especially favored in Pennsylvania, as the courts have at various times declared. This contract the court described in *Ingersoll* v. *Sergeant* as one of landlord and tenant yielding rent service, and, therefore, ought to be governed by the rules regulating rent service, which, in the absence of the statute of *Quia Emptores*, import a tenure with fealty to pay the rent forever, and is almost the first study placed in the hands of the Pennsylvania student at law.

The mutual deed of the parties, executed in counterpart,

imports a tenure. Although not a rent charge, the words of the grantee in the ground-rent deed, for the purpose of a contract, apart from tenure, would be considered as a confirmation from the tenant to the landlord of the rent in question; and this was admitted by Chief Justice Woodward, in *Wallace* v. *Harmstad*, 8 Wright, 492, outside of any question of tenure, that the tenant should perform his express covenant under all circumstances. He has not just cause of complaint, and can always protect himself, because it is in his power, and it is his duty to pay, or cause to be paid, the rent reserved by the grantor in the original deed.

As conclusively explained in *Ingersoll* v. *Sergeant*, page 353, the rent service being given by way of retribution to the landlord for the land demised by him to the tenant, and the obligation of the latter to pay the rent arising from his having enjoyed the land under a contract with his landlord, it is reasonable that his obligation to pay should be regulated by the extent of his enjoyment; and, therefore, it is that if he be legally deprived of his enjoyment of part of the land demised, he shall be released from the rent only in proportion to the value of the land evicted. And in no case shall an eviction of part of the demised premises, where the tenant continues to enjoy the residue thereof, discharge him from the payment of the whole rent, unless it be for the tortious act of the landlord himself, who shall forego all right to receive it in such case, as long as he prevents the tenant against his will from enjoying any part of the land.

The plaintiffs make no new argument, raise no extraordinary defense, but, as a matter of public policy, contend that this inheritable estate shall be placed upon the same foundation as other estates, and that their contract shall be interpreted by the settled law of the land; and so this contract between the ground-rent landlord and tenant, has always been treated, as expressed in *St. Mary's Church* v. *Miles*, 1 Wharton, 229.

There the court declared: "We have no statute barring the right of an owner to an estate consisting of ground rent, through his neglect to assert it, nor yet to preclude him from

recovering the rent itself after any lapse of time. It is true that statutes of limitations, embracing legal estates or legal rights alone, have been extended and applied by courts of equity to estates and rights of an equitable character, in order to guard against evils attending the latter description of estates and rights similar to those provided for in respect to legal estates and legal rights by such statutes; but they have never been extended, by either courts of law or equity, to estates or rights purely legal, not considered as coming within either the letter, spirit or meaning thereof. The ground rent, then, in question, being an estate purely legal, and there being no act or statute of limitation in force here which comprehends it, it follows that the courts have no authority to interpose a limitation that would bar the plaintiff of his right to enjoy it. *The exercise of such a power would not only seem to be intrenching upon the legislative province, but upon the constitutional right of the plaintiff, by depriving him of his estate without having given him any previous warning of his danger, so as to enable him to guard against it.* It is proper here to bear in mind that it is the title or right of the plaintiff to the rent as his freehold estate that we are considering, and not his right to receive and enforce the payments of the back rents which are the fruits of it, and which he alleges to be due and unpaid; because the rent after it has become payable is a mere debt or chose in action which, from lapse of time, a jury might presume has been paid in the absence of everything tending to show the contrary; but still the existence of the estate is not affected by such presumption, nor the right of the owner, therefore, to demand and recover the subsequent accruing rents. It is of the very essence of the estate here that it should continue to exist according to its original limitation contained in the reservation creating it; and, accordingly, it must endure forever, unless destroyed or put an end to by some positive act of the party having the power to do so, or by act or operation of law. But why should the neglect of the owner of the rent to demand it, after it has become payable for any given length of time, produce the same effect? Such neglect cannot, in the least, interfere with the

rights of the owner of the lot; nor prejudice him in any way. He has a right to use and improve the lot if he please; and this is all perfectly consistent with the duty that he owes to the owner of the ground-rent. Their respective estates are distinct and susceptible of being fully enjoyed without conflict. Ground rents seem to have been created in this State with a view to promote the improvement of unimproved lands, by affording the grantees the opportunity of employing their money in putting up dwellings and other houses thereon, instead of giving it to the grantors in payment of what would have been considered a fair price for the purchase of the fee simple in the land, without any reservation of rent. The rent reserved in such cases forms the only and whole consideration that is to be paid for the land, and the grantee is bound to pay it only as long as the title which he received from the grantor proves sufficient to protect and secure him in enjoyment of the land granted. Hence the right of the owner to the ground rent seems to be founded in great equity as well as justice, and ought not, therefore, to be regarded with any disfavor. Such a thing as the extinguishment of a ground rent by the owner thereof has seldom, perhaps never, happened without his executing a deed or instrument of writing to that effect, which may be placed on record, and the owner of the ground be thus protected forever after against the payment of the rent. There would seem, therefore, to be little reason for presuming a release of the ground-rent merely from the delay of the owner in demanding it. Such presumption, if it were to be made, would doubtless be contrary to the truth of the fact in every case, and would certainly work injustice to the owner of the ground rent. As long, therefore, as the ground rent can be shown to have been created by a valid deed, and the title thereto clearly be established in the party claiming it, mere lapse of time ought not to be considered sufficient to raise the presumption that it has been released."

This was affirmed in the case of *McQuesney* v. *Hiester*, 9 Casey, on the authority of the ruling in *Sir William Foster's Case*, 8 Co. 129, where it was held the right to the rent was evidenced by reservation by deed. In *Lyons* v. *Adde*, 63

Barbour, (N. Y.) 89, the court held that the conveyances of the Van Rensselaer manor lands were deeds of assignment leaving no estate, reversion, or possibility of reverter in the grantor, and not creating rents service; but they do create rents charge, and, therefore, any release must be by deed, especially when the grantees have accepted their conveyances, which amounts to an implied covenant to pay, added to the proof or admission that such rent has not been paid.

In *Naglee* v. *Ingersoll*, 7 Barr. 196, the court said that the grantee of land in fee, out of which a rent is reserved in the nature of a rent service by an indenture, is estopped denying the title in the grantor to whom the rent was reserved, and this was because of the existence of the tenure of landlord and tenant.

In *Cadwalader's Appeal*, 31 P. F. Smith, 194, the case of a lease for ten thousand years, the court said the statute of limitations does not run against the landlord until the tenant has terminated the relation by some judicial act clearly evidencing adverse possession; that the statute of limitations does not begin to run in favor of one who had held in subservience to the title of another until the privity between them is severed by some unequivocal act.

In *Wood's Appeal*, 6 Casey, 274, it was said the Act of 1849, in reference to the wages of miners, could not impair the contracts between landlord and tenant. Again, in the case of *Hillerman* v. *Ingersoll*, 5 Phila. Rep. 143, the court, Hare, J., said, in the case of a bond without payment or acknowledgment for twenty years, there may be enough to justify the belief that it has been paid, because the obligor is in default as long as the condition is broken, and the obligee may proceed at once to get his money; but with the ground-rent there is this difference, the purpose is not that the principal shall be paid, but shall remain until the tenant sees fit to pay it. The landlord cannot call in his money, and must suffer it to stand until it is brought to his door. The grantee of the land, subject to the ground rent, has covenanted to pay the rents; it is his duty to pay, and the covenant excuses demand, as was decided in *Ingersoll* v. *Sergeant*, *St. Mary's*

Church v. *Miles*, *Bosler* v. *Kuhn*, 8 Watts & Sergeant, 183, where, also, in all three cases, the court disposed of the comparison to a mortgage or other specialties.

When the law creates a duty or charge which the party is disabled to perform without any default in him, and he has no remedy, the law will excuse. This is the principle upon which the tenant has been held to be discharged from payment in certain cases of apportionment. But where the party by his own contract creates a charge or duty of himself he is bound to make it good, even in the case of any accident or inevitable necessity, because he might have provided against it. On this point it was decided that the tenant was bound to pay the rent, though an army had entered and kept him out of possession, because of the express agreement between the parties, and not by act of law. So, in case of the destruction of the demised premises by fire, it was well settled that he was bound to pay the rent. This last example seems peculiarly in point here, because, no doubt, one of the reasons for this ruling was that the tenant should not gain from any negligence or *mala fides* on his part.

In both of these cases the covenants amounted to an agreement between the parties, and there was no reason why the lessor should suffer more than the lessee, since the lessee had entire power over the land, and covenanted to pay the rent under all circumstances. It is directly against the principles of prescription, for, if he has had a quiet, uninterrupted posession, the presumption is that he has paid the rents, without which he would not have been suffered to continue in such enjoyment as set forth in the deed. The acquiescence on the part of the ground-rent landlord presupposes payment of all rents due.

As a general rule of law, nothing can be claimed against that which owes its origin to matter of record, and this is to be distinguished from the presumption of a lost grant or record, which the jury may find from lapse of time and other circumstances; that is to say, the deed itself wanting, the establishment of its existence is inferred from secondary evidence. In the case of the extinguishment of a ground rent, it should be

under claim of title adverse to the owner of the ground-rent, with his knowledge and acquiescence, and the burden of proof is on him claiming the adverse possession. It ought to be noticed that, unlike the statute of limitations, which merely affects the remedy by providing that no action can be maintained after the lapse of a certain number of years, the Act of April 27, 1855, goes further, and deprives the owner of the ground-rent of his estate, and gives it to another.

The Act of 32 Henry VIII., c. 2, extinguishing the remedy of avowry for rent after a lapse of fifty years, was called a statute of repose for the quieting of men's titles; but in the case of a ground rent, unless the ground-tenant shows his own compliance with the deed, he has no equity to demand the quieting of his title. And how can the ground-rent landlord be ousted and disseized when he rests under the declaration in the deed that the tenant holds under him on payment of the rents, on pain of forfeiture if he fails? Although quit-rents were comprised under the Statute 32 Henry VIII., Coke says: "The statute does not extend to a rent created by a deed, nor to other reservation upon any particular estate, for in the one case the deed is the title, and in the other the reservation."

The rent is the return for the enjoyment of the land, but there is no disturbance of this enjoyment on the part of the grantor; the act is, therefore, in direct opposition to all reasons for extinguishment. The fact that no re-entry has been made in accordance with the proviso in the deed, is evidence to show that the rent was paid; while this act, instead of forcing the grantee of the land subject to the rent to prove it had not been paid, obliges the grantor of the rent to show that it has been paid. Especially would this be at variance with established principles of law in Pennsylvania, where tenure exists at least to the extent of fealty attached to rent service, of which feudal burden to pay the rent reserved he could never divest himself.

How could such an act apply to the quit-rents of the proprietary tenths or manors directly preserved to them by the

Divesting Act of November 27, 1779?* In the English Law there can be no prescription against an Act of Parliament as the highest proof of matter of record. It has already been seen in the Legal Tender Cases that Congress could not pass laws changing the kind of money contracted for in ground-rent deeds, though Strong J., in *Shollenberger* v. *Brinton*, 2 P. F. Smith, 9, declared that the United States were not prohibited from passing any law imparing the obligation of contracts, while this was denied to the States: *Evans* v. *Eaton*, 1 Peters, C. C. R., 322. This was on the ground that the parties had made the law for themselves, and that it was not for the public benefit to impair the obligation of such contracts. It is true that the contracts are made subject to the power of eminent domain, but no State, no Government, can abrogate them to help an individual to avoid duties he has deliberately imposed upon himself by his covenants in the deed. And in *Dutton* v. *Pailaret*, 2 P. F. Smith, 113, the courts said the bargain must be presumed to rest upon an adequate consideration, and neither judicial nor legislative power can pluck the fruit which belongs to one for the mere purpose of giving it to another, even on the ground of patriotic necessities.

In *Hepburn* v. *Griswold*, 8 Wallace, 603, see also *Butler* v. *Horwitz*, 7 Wallace, 258, a case of lease for ninety-nine years; and *McCabe* v. *Emerson*, 6 Harris, 111, all agreed that the Legal Tender Acts did impair the obligation of contracts. No monarchy ever abolished tenures, quit-rents, and services without compensation to the lords. To give this instrument reserving a ground rent even the ordinary effect of a conveyance in fee, the words of a grantor must be taken most strongly against the grantor as to the estate, and most

* In regard to the Divesting Act itself, Huston, in a note to his work on Land Titles in Pennsylvania, said: "The old officers and friends of that family complained of it much. I have heard Judge Tilghman call it a high-handed measure; and once he said it was an instance that 'might made right.' Shippen and Yeates, when it was quoted before them, treated it as the law of the land, and a most important law, and said, as the proprietary family had agreed to it and accepted the money, it was at least useless for other people to make objections."

strongly against the grantee as to the rents and services. The right of eminent domain could not even be invoked in behalf of apportionment where the property is taken for public use by a railroad company. As when the states attempted to pass stay laws, by which creditors were compelled to await the payment of their just demands, and to receive paper money representing to be of the value of specie, it was resolved in national conclave that no State should emit bills of credit, make anything but gold and silver coin legal tender in payment of debts, *or pass any law impairing the obligation of contracts.* In most, if not all, the colonial grants before the Revolution there was a reservation of quit-rent, not so much with a view to derive any pecuniary benefit, as evidence of tenure and acknowledgement. We have few instances where such rents were demanded. On the contrary, it was usual to insert the words "yielding and paying when demanded." The Proprietaries of Pennsylvania only regularly rendered the two beaver skins to the Seigniory of Windsor when they apprehended danger to their title, in the dispute with Lord Baltimore as to the boundaries of the province. How much stronger, then, is the case, when, in the ground-rent of Pennsylvania, as it falls due, the tenant evidences his fealty by the deed, and binds himself to a pecuniary benefit by his own covenant.

Chief Justice Woodward, in *Wallace* v. *Harmstad*, 8 Wright, 492, himself admitted that if our titles were feudal, the tenant could not escape his obligation, even where the deed was lost or destroyed. Apart from these arguments, the injustice is that the landlord cannot now compel the tenant to pay the principal of the ground rent, and since the Act of 1850 he cannot threaten the tenant that the rent shall become irredeemable, if not paid within any certain period. He must wait until the tenant sees fit to pay it. He is not guilty of laches, nor the tenant of default, and there does not seem to be room for the presumption which might arise if the one should fail to perform his part of the contract and the other to insist upon performance. If there had been a release, it is incumbent upon the grantee of the land subject to the rent to place it upon record, and perpetuate the evidence. The Act

of April 27, 1855, insists, upon the contrary, that the grantor of the land should perpetuate the testimony. Even should the tenant have gone on and regularly paid as the rents come due, the owner of the rent is entirely at the mercy of the tenant, and is in constant dread of forfeiture, unless the tenant is honest enough to produce the evidence, which it is for his advantage to conceal, and succeeds only by denying that he has done that which, by his most solemn act, he has bound himself to do; certainly, as the learned Judge, in *Hillerman* v. *Ingersoll*, 5 Phila. Rep. 143, said, "reversing the natural order of things." In covenant on a ground-rent deed, executed by the defendant, it was held that parol evidence was not admissible, *Buck* v. *Fisher*, 4 Wharton, 516, to prove that the lot formed part of a larger lot, which had been taken from the plaintiff by A, and by an express agreement made between A and the agent of the plaintiff, the lot was subdivided and deeds to different portions made to persons named by A, and among others to the defendant, with the understanding that A was to pay the whole ground rent. The court added: "It would be attended with an alarming degree of danger to receive parol evidence in derogation of one of the most solemn acts known to law." Yet this act proposes to allow the tenant by parol evidence not only to impair his written contract, but repudiate altogether that which stands before the world like a judgment confessed, and especially protected by the Constitution of Pennsylvania, declaring that even the right of eminent domain cannot override without compensation. It could hardly be contended that the annuity, which the testator had charged upon lands for the support of his widow for life, could be lost to the widow or remainder-man by evidence that the owner of the land has avoided payment, nor could the moral sense of the community stand the shock of the discussion whether the Legislature could authorize the owner of land to extinguish such annuity on any terms whatever, yet it is in the nature of a rent charge. If, at the very least, the act releases the tenant from an action of debt, how can it relieve him from an action on his covenant? In *Frank* v. *Maguire*, 6 Wright, 77, and *Scott* v. *Lunt's Administrator*, 3 Cranch C.

C. R. 286, it was decided that the assignment of the tenant, and the acceptance of rent from the assignee, did not release the tenant from his covenant to pay the rent. He was bound by his express covenant, unless specially released. In the case of a ground rent to one for life, with remainder over, should the remainder-man suffer for the default of the tenant for life? The reply that the law abhors stale demands, and that a court of equity will aid against laches, cannot apply here. Again, we presume the statute could not have a retroactive effect, unless a court should decide specially that it could, under the proviso that this act shall not be in force until three years from the date thereof.

If there could be any interference with the owner of the land, or any injury to the public from the loss of improvements, or casting a burden upon the tenants, either unexpected or oppressive, there might be some argument against an over-indulgent landlord; but there is none; it is all for the benefit of the tenant and the public, and the estate of the grantor of the land is greatly favored in law and equity. "*Cessante ratione cessat ipse lex.*" From its very essence, then, justice requires that it continue to exist in accordance with its original positive act of the party who has the power to do so upon compensation understood between themselves. It has been declared that the Legislature could not divest the grantor of his estate in an irredeemable ground rent, with all its provisions for taking his property under the guise of public use with compensation, 17 P. F. Smith, 479; how, then, can it divest him of his estate without compensation?

In *Lyon* v. *Adde*, 63 Barbour (N. Y.), 89, in discussing the conveyances of the Van Rensselaer manor lands, the court held that they were deeds of assignment, leaving no estate, reversion, or possibility of reverter in the grantor, and not creating rents service; but they do create rents charge, and therefore any release must be by deed, especially when the grantees have accepted their conveyances subject to the rent in the original conveyances, which amounts to an implied covenant to pay, added to the proof or admission that such rent has not been paid. In Pennsylvania the warranty

in the ground-rent deed, especially warning the grantee that paying the yearly rents as they become due, and performing the services at the times therein mentioned, raises the presumption for the purpose of an argument that they have been paid, and that the grantee is enjoying his estate in consequence of his duty in this behalf, with the further covenants between them that should he pay the principal sum and the arrears to the time of such payment, then the same shall forever thereafter cease and be extinguished, and the covenant for payment thereof shall become void, etc. Can the legislature change all this?

In the case of *Korn* v. *Browne*, 14 P. F. Smith, 55, the Supreme Court, however, held that the Act of April 27, 1855, had a retrospective operation with regard to ground-rents, and that as it did not take effect for three years, ample time was given to all owners of ground-rents to make claims and demands for the same, so as to prevent the bar of the statute. "This prospective commencement makes the retrospective bar not only reasonable, but strictly constitutional." The court said: After a lapse of twenty years, bonds and other specialties, merchants' accounts, legacies, mortgages, judgments, and, indeed, all evidence of debt excepted out of the statute, are presumed to be paid. The court will not encourage the laches and indolence of parties, but will presume, after a great length of time, some compensation or release to have been made. The rule of presumption, when traced to its foundation, is a rule of convenience and policy, the result of a necessary regard to the peace and security of society."

The case of a mortgage we have shown is different; it is only a security for the payment of a debt. If, as originally in England, it was a conveyance of land absolutely, and only could be rendered ineffectual by payment on or before the day, the court would not then have so held. It was declared, in *Martin* v. *Sommerville*, 3 Wallace, Jr., 206, that when the Legislature passed an act for the relief of the creditors of a manufacturing corporation, providing that certain persons should be authorized to sell all property mortgaged for the payment of bonds at public sale to the highest bidder, free

from all encumbrances, and after paying certain expenses and costs, should distribute the proceeds to the corporation creditors according to the priorities of lien, such legislation was unconstitutional by reason of impairing the obligation of contracts between the mortgagor and mortgagees, and deprived the mortgagees of a remedy which existed at the time the contract was made. Here the ground-rent landlord has parted with the land under the contract whereby the grantee grants the rent in lieu of the land, under certain conditions, and evidences it by record. The deed itself is the evidence, and a release by deed is necessary in order to extinguish the estate of the ground-rent landlord. The covenants excuse demand. It is merely a pretence to say that the act was intended to supply a defect in the law. It aids the owner of the land, who has no right to be freed from what is virtually the purchase money which should be paid, or proved to be paid, by himself on his own terms. How can we say that the Legislature applied the same rule of limitation in adverse possession as to other real estate? In the case of a tenancy for years, the tenant would not be allowed to deny his landlord's title, which is in Pennsylvania a rent service; how much less argument, then, where the largest measure of the estate of each is distinct, accurately defined and described, and the existence of tenure between landlord and tenant recognized, as in the lease for years. Good faith and respect for his contract binds a lessee to restore the possession; he could not even show title in a third person, for he cannot change the nature of his possession. The statute of limitation does not begin to run as against the landlord until the tenant has terminated the relation by some unequivocal act, clearly evidencing adverse possession. This act does not make that unlawful which was lawful before, but makes that lawful which was unlawful, and deprives him of any defense. It has more than once been held that there are certain principles of law qualifying all that falls from the lip of a judge in expounding the common law, and all that is found in the statute book; among them, that, where there is an express contract, a man is answerable for any injury or mischief to another,

even by the act of God: *The River Wear Com.* v. *Adamson*, L. E. R. II. 508.

If the rights of the individual must yield to the general welfare, his property can only be taken under the special provisions that no man's property shall be taken or applied to public use without his consent, and without a just compensation being made. Whether a use is a public or private one is a question for judicial determination, and it is the question upon which the right of the legislature to interfere with private property depends. All the cases concede this principle, namely, that whether the use is public or private can only be judicially determined; and cases in which the action of the Legislature condemning or authorizing the condemnation of property has been sustained are founded upon the concession or adjudication that the use for which the property is taken is in its nature public. It has been argued that the property of a burial ground was used as a place of burial, and that the burial of the dead is a public benefit, and therefore the use is public, or in the public authorities, or in their control. But the answer is, that the right of burial in these grounds is not vested in the public, nor in the public authorities, nor subject to their control, but only in the individual lot-owner. If the fact that it is a benefit to the public that the dead should be buried is sufficient to make a cemetery a public use, the Legislature might authorize A to take the land of B for a burial place of A and his family. The fact that this land is taken for the benefit of a number of individuals for division among themselves or their grantees, for their own use as a cemetery, makes the case no stronger than if taken for the benefit of a single individual.

As Chief Justice Woodward remarked, in *Gault's Appeal*, 9 Casey, 94, as to seizure and sale of land without notice: "To divest ownership without personal notice and without direct compensation is the instance in which a constitutional government approaches most near to an unrestrained tyranny. Whatever tends to modify this right is favorable to the citizen, and ought to be liberally construed, on the principal that remedial statutes are to be beneficially expounded."

In *Stuber's Case*, 4 Casey, 199, the court, Lowrey, J., said: "Rights vested by contracts are especially guarded and protected by the Constitution". Again, the court, in *Palairet's Appeal*, 17 P. F. Smith, 485, said, decidedly, that an Act of Assembly taking the property of one individual and giving it to another is in no sense constitutional.

In *Coster* v. *Tide Water Company*, 3 C. E. Green, 65, the Chancellor of New Jersey said: "It is clear the Legislature cannot grant an interest in, or charge upon, or a rent issuing out of private property, to private persons for their own profit. The public cannot go upon this property or use it, which is the test of public use."

There is no adjudicated case where the Legislature ordered the sale of estate of one man's land, when he was *sui juris* and under no legal disability to act, for the benefit of another person, also *sui juris*, and where such legislative decree was sustained. It was not considered necessary to insert in the Constitution a disabling clause, not only because the general provision of the Bill of Rights was deemed sufficiently explicit, but because no Legislature would be so regardless of right as to attempt it. But it was deemed necessary to insert a special provision in the Constitution to enable them to take private property, even for public use, and upon compensation made. True, the Legislature destroyed survivorship in joint tenancy, *Bambaugh* v. *Bambaugh*, 11 Sergeant & Rawle, 191; but the court expressly said the act deprived no man of his property; where a title had already accrued by survivorship it remained untouched. The only effect of the law was to place the parties on an equal and sure footing, leaving nothing to chance, without destroying, however, the right of making any agreement between themselves which they might think proper.

Norris v. *Clymer*, 2 Barr, 285, was the case of a conversion. It was there said that the Constitution allows every power which it does not expressly prohibit; but taking the property of one man to be given to another is expressly prohibited by limitation. In the case of *Menges* v. *Wertman*, 1 Barr 219, there was a moral obligation to convey, and the act merely gave effect.

It is sought to evade these arguments by replying, as in *Sturgis* v. *Crowinshield*, 4 Wheaton, 193, that the remedy may certainly be modified. It was also decided in *Evans* v. *Montgomery*, 4 Watts & Sergeant, 220, that the Legislature can pass laws limiting, modifying, and even taking away the remedy; but then the court added, where the provisions apply only to future proceedings, there is not the least ground for appealing to constitutional restrictions on the power of the Legislature. "If the parties to an agreement included in it the legal remedies by which the contract is to be enforced, a legislative enactment changing the remedial process agreed on in regard to that contract is as clearly unconstitutional as the attempt to impair the obligation of any other contracts." But a statute strictly remedial may impair the obligation of contracts; when this happens, the statute is unconstitutional. This always happens when the remedy forms part of the contract, and subsequent legislation conflicts with what they have expressed in their agreement. The Legislature can no more overthrow the lawful contracts of parties, under guise of remedial legislation, than by direct assault. They can pass no law that impairs the obligation of contracts.

The Act of February 26, 1869, P. L., page 3, is a supplement to the Act of April 27, 1855, which attempted to provide that under certain cases by the implied act of the parties an apportionment might be presumed, because no demand had been made for twenty-one years. *In re* petition of J. A. Brown, 9 Phila. Rep. 548, the petition was dismissed, with the remark from the court that it was unnecessary to consider the question of unconstitutionality of the act, because the case was not one which it was intended to meet.

In re petition of Longstreth's Executors, the Act of April 28, 1868, P. L., 1147, providing, that in all cases in which ground-rents have been or may be extinguished by payment or by presumption of law, but no deed of extinguishment or release thereof shall have been executed, the owner or owners may apply by petition to the Court of Common Pleas for the City and County of Philadelphia; that the said court may

decree extinguishment, and a duly certified copy of such decree may be recorded, etc.

The court granted the petition on the authority of *Korn* v. *Browne*, sustaining the Act of April 27, 1855, 7 Phila. Rep. 460. In *Haine's Appeal*, 23 P. F. Smith, page 169, the same case was reviewed. The counsel for appellant contended that the act was unconstitutional, as it deprived the respondent of his right to appeal to the jury, and usurps the judicial power vested in the courts; and, further, that the act operated upon the contract itself, impairing this obligation, in the violation of the Constitution of the United States.

The court said decidedly that it was unconstitutional, and that no case had been produced, "and we think none can be, which goes the length which must be maintained here, that wherever there is an outstanding claim or encumbrance upon an estate, which is barred by reason of lapse of time, and, therefore, cannot be enforced at law, but which, nevertheless, is a cloud upon the title and prevents it from being marketable, the possessor can invoke the aid of a court of equity to remove the cloud and forever bar such claim or encumbrance by a perpetual injunction.

" We assume, in this judgment, that the evidence brought the case entirely within the purview of the Act of April 27, 1855. Upon that, however, we give no opinion."

Previously, the same court, in *Palairet's Appeal*, 17 P. F. Smith, 479, Sharswood, J., delivering the opinion, held, that the Act of April 15, 1869, providing for the extinguishment of irredeemable ground rents with compensation to the owners, was unconstitutional and void. An act which operates retrospectively to take what is by the existing law the property of one man, and without his consent transfer it to another, although with compensation, violates the Bill of Rights.

"And if an Act of Assembly can deprive a man of his property without a trial and judgment for even legal cause of forfeiture, it may in like manner deprive him of his life or his liberty, imprision him in a dungeon, or hang him without judge or jury."

In his dissenting opinion, Agnew, J., admitted that the act might be impugned as impairing the contract in a ground-rent deed, but contended that it did not really deprive any man of his property, only by conversion substituted money for the estate in the land.

In the late discussion of *Palairet* v. *Snyder*, 10 Outerbridge, 227, as to the application of the act of April 22, 1850, to such deeds, where a perpetual rent is reserved, with a proviso that the grantee, his heirs and assigns, should, within ten years from the date thereof, pay to the grantor a capitalized sum and the arrearages, then said rent should cease, it was held that such a rent could not be redeemed after the period had elapsed, as the Legislature did not make it clear that it was intended to apply to that class of cases. It was urged, however, by counsel for plaintiffs in error, that such an act would be unconstitutional under *Palairet's Appeal.*

Palairet's Appeal, then, and the final decision of the United States Supreme Court, in the Legal Tender Cases, declaring that the Government of the United states could not, even in a struggle for existence, change the kind of money called for in a contract, certainly overrule *Korn* v. *Browne*, upon which alone the defendant in his suit relies, and leave the law as it was with *Ingersoll* v. *Sergeant* and *St. Mary's Church* v. *Miles.*

However, the court, in *Biddle* v. *Hooven*, sustained *Korn* v. *Browne*, to the extent that the act did not impair the contract between the parties to the ground-rent deed, but said, further, "we cannot give that case the full effect claimed for it."

Continuing, the court added that it was a settled legal principle that statutes which merely affect the remedy are not unconstitutional, and that while the ground rent was forever hereafter irrecoverable, the estate of the ground-rent landlord was not impaired! The Christian Scientist can only succeed with the hysterical or those who have imaginary ills.

Affect means to act upon, not to take away. Remedy means redress. Redress means satisfaction for an injury.

Is it for one moment to be supposed that the estate in the rent is not impaired, when the owner can no longer enjoy it? Or does the court mean to say that only the past rents com-

prised in the twenty-one years as choses in action cannot be recovered, but those in the future can still be collected until another twenty-one years have elapsed, and so on? This would seem an explanation if the court had not also said, "we cannot see any reason to declare the act unconstitutional.

"The act was not intended to destroy the landlord's ownership in the rent; it does not impair his title thereto; nor can it be said to impair the contract by which the rent was reserved, but upon the well-grounded reason of public policy it declares that when the owner of such rent makes no claim or demand therefor for twenty-one years it presumes it had been extinguished, which means nothing more than it has been paid. The language cited as before affects only the remedy; if it meant more it would be void for excess."

Yet, in this very case of *Biddle* v. *Hooven*, the defendant tenant asserted and maintained that he had not paid the rent, and claimed an extinguishment because he had not paid for twenty-one years, repudiating his contract, and defying the title of his landlord in accordance with the provisions of the Act of 1855 in his behalf.

The court overruled *Korn* v. *Browne* to the extent that the presumption of payment was not a legal presumption, but a presumption of fact liable to be rebutted; the court decided that the Legislature did not mean what it said, and cured the evil by substituting presumption of fact for legal presumption.

This is certainly confession, begging of the whole question, and an assumption of power. For while the court might limit the effect of an act of the Legislature, it certainly could not entirely change the intent.

Had the court, in *Biddle* v. *Hooven*, simply affirmed the previous ruling in *Korn* v. *Browne*, there would be no difficulty; the Act of 1855 would be clearly unconstitutional. Now, however, who can tell what is the law on this question? The array of authorities in Pennsylvania, and in all parts of the United States, from the time that Daniel Webster defended the charter of Dartmouth College to the Supreme Court of the United States to-day, completely discredits the conclusions in *Biddle* v. *Hooven* as well as *Korn* v. *Browne*.

More than this, the court deciding this question is unable to enter a decree quieting the title of the terre-tenant, and thus enforce its own judgment.

In *Haines Appeal*, 23 P. F. Smith, 169, the court said, such an act on the part of the Legislature would be unconstitutional, and a court of equity could not aid the owner of the land by perpetual injunction to remove the blot upon his title.

As to the sections of the act requiring the owner of the rent to perpetuate the evidence of payment, is not the recorded deed of the defendant's title, expressly stating that he still holds the land, subject to the rent as expressed in the original ground-rent deed, better evidence than a mere receipt?

The authorities are so overwhelming, the objections so numerous, with points bristling on all sides, and the case so clear, that the very clearness, the very simplicity, makes it difficult to know where to attack first.

The only hope is that this question may again be argued to let the court right itself, as was done by the United States Supreme Court in the Legal Tender and Income Tax Cases.*

Richard M. Cadwalader.

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*See cases in note to *Biddle* v. *Hooven*, reported 13 Atl. Rep. 927, where it is held that the remedy might be changed, but the contract could not be materially affected, or the remedy taken away entirely.

During the anti-rent agitation in New York in 1846, a convention met to form a new Constitution. Though the feeling was with the anti-renters against the Van Rensselaer rent, charge landlords, feudal tenures with their incidents were abolished, "saving and excepting all rents, services which have been heretofore at any time lawfully created."

A committee of the two houses of the Legislature, of which Samuel J. Tilden was chairman, reported, among other things, against an act to allow the tenant to dispute his landlords' title as unconstitutional and against public policy.

A bill was prepared and certain provisions made to enable the tenant to become a purchaser on the death of his landlord. The bill failed in the Senate under the argument that the Constitution of the United States declares that no State can pass an act impairing the obligation of contracts": "The Anti-Rent Agitation in the State of New York," by Edward P. Cheney, A. M. Publication of the University of Pennsylvania, pages 53 and 55.